

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

| | | |
|---------------------------|---|--------------|
| DULCIDIO QUIRINDONGO | : | |
| | : | CIVIL ACTION |
| Petitioner, | : | |
| | : | |
| v. | : | |
| | : | |
| UNITED STATES OF AMERICA, | : | No. 02-308 |
| | : | 98-CV-602-1 |
| Respondent. | : | |

O P I N I O N

NEWCOMER, S.J.

July , 2002

Presently before the Court is Petitioner Dulcidio Quirindongo's Motion to Vacate, Set Aside, or Correct a Sentence pursuant to 28 U.S.C. § 2255 and the Government's Response thereto. For the reasons discussed below, said Motion is denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

On December 2, 1998, a federal grand jury returned an indictment charging Petitioner with multiple counts in violation of 21 U.S.C. § 846, 21 U.S.C. § 841(a)(1), and 21 U.S.C. § 860. The indictment arose from Petitioner's sale of heroin to a cooperating citizen on six occasions and an undercover Berks County Detective on four occasions in and around Reading, Pennsylvania. In addition, the Government filed documents indicating that upon conviction, Petitioner faced a mandatory minimum sentence of life imprisonment.

On May 25, 1999, Petitioner appeared before this Court to plead guilty to all counts listed in the indictment. During an extensive plea colloquy with the Court, Petitioner affirmed that he intended to plead guilty and that he understood the ramifications of such a plea. Thereafter, the Court accepted Petitioner's guilty plea and entered judgment against him. On November 23, 1999, the Court sentenced Petitioner to a term of life imprisonment.

On November 30, 1999, Petitioner filed a pro se Notice of Appeal. Counsel for Petitioner subsequently filed an Anders brief in the Third Circuit Court of Appeals recognizing the absence of appealable issues. The Third Circuit Court of Appeals then affirmed Petitioner's conviction. On January 29, 2002, Petitioner filed the instant Motion.

II. DISCUSSION

Petitioner sets forth three claims in the instant motion: (1) Petitioner alleges that he entered the guilty plea involuntarily, resulting in a violation of his Fifth Amendment right to due process; (2) Petitioner alleges misconduct by defense counsel resulting in a violation of his Sixth Amendment right to effective assistance of counsel; and (3) Petitioner alleges that his sentence is in violation of the Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000).

A. Involuntary Entry of Plea

Petitioner asserts that the guilty plea he entered before this Court was involuntary. Specifically, he alleges that defense counsel's failure to advise him of the full facts of the Government's case against him and the consequences of entering a guilty plea rendered his plea involuntary. As a result, Petitioner contends that he has suffered a violation of his right to due process under the Fifth Amendment.

Due process mandates that a plea be both voluntary and knowing. Boykin v. Alabama, 395 U.S. 238, 244 (1969). A plea that is entered on the advise of counsel is voluntary where counsel's advice is "'within the range of competence demanded of attorneys in criminal cases.'" Hill v. Lockhart, 474 U.S. 52, 56 (1985) (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)). Thus, because the record indicates that Petitioner was duly represented at the time he entered the guilty plea, the success of Petitioner's due process claim will turn on the merits of his claim of ineffective assistance of counsel.

B. Ineffective Assistance of Counsel

Petitioner asserts that defense counsel's failure to advise him of the consequences of his guilty plea, as well as his failure to advise him of the facts of the Government's case against him amount to a violation of the Sixth Amendment's guarantee of effective assistance of counsel. In order to prevail on such a claim, Petitioner must establish: (1) that

counsel's representation fell below an objective level of reasonableness; and (2) that the conduct of counsel prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). While Petitioner must satisfy both tiers of the Strickland standard, this Court need only address the second tier as Petitioner fails to establish counsel's conduct prejudiced his defense. United States of America v. Nino, 878 F.2d 101, 104 (3d Cir. 1989) (noting that Strickland invited courts to examine the two tiers in any order).

Within the context of the plea process, prejudice is established where a petitioner demonstrates that had counsel not given the erroneous advice, he would have elected to proceed to trial. Hill, 474 U.S. at 58. Even if prejudice does result, Pennsylvania federal courts have consistently held that an extensive plea colloquy serves to dissipate the prejudicial effect of counsel's failure to properly advise the defendant with respect to the ramifications of entering a guilty plea. U.S. v. Ocampo, No. CIV.A.97-1996, 1997 WL 364485 at *1-*2 (E.D.Pa. 1997) (Weiner, S.J.) (noting it disingenuous to assert that defense counsel's actions prejudiced the outcome of the plea process following defendant's admission that he understood the plea he entered); See also Payne v. United States, 422 F.2d 376, 377 (W.D. Pa. 1970) (Miller, J.) (holding defendant's sworn testimony that he understood possible length of sentence dissipated prejudicial effect of counsel's erroneous advice);

McCoy v. U.S., 96 F. Supp.2d 469, 479-80 (E.D. Pa. 2000)

(Robreno, J.) (holding defendant's acknowledgment that he faced sentence of life imprisonment sufficiently indicated awareness of ramifications of guilty plea).

In light of these holdings, this Court finds that the alleged conduct of defense counsel did not prejudice the Petitioner in such a manner as to effect the outcome of the plea process. Here, as in the cited holdings, the record of the colloquy between Petitioner and the Court clearly demonstrates that Petitioner entered the plea upon his own volition. (Plea Tr. at 14-15). Moreover, Petitioner stated in two separate exchanges with the Court that he understood the consequences of his guilty plea and that he faced a mandatory minimum sentence of life imprisonment, thus dissipating any possible prejudice caused by defense counsel's conduct. (Plea Tr. at 15-16).

The record also indicates that the Assistant United States Attorney apprized Petitioner of the facts of the Government's case against him during the plea colloquy. (Plea Tr. at 25-33). During this exchange, Petitioner listened to the facts presented by the Government and affirmed the truth of those facts. (Plea Tr. at 35). Clearly, Petitioner's assertion that he was unaware of the facts of the Government's case against him is without merit.

Petitioner failed to establish ineffective assistance of counsel. The record clearly indicates that the extensive

plea colloquy dissipated any prejudice caused by the alleged inaction of defense counsel with respect to informing the Petitioner of the ramifications of entering a guilty plea as well as the alleged failure to inform the Petitioner of the facts of the Government's case against him. Thus, this Court finds that Petitioner entered the guilty plea voluntarily as Petitioner failed to establish that he received ineffective assistance of counsel.

C. Apprendi v. New Jersey

Finally, Petitioner claims that the enhancement of his sentence to a mandatory minimum of life imprisonment violates the Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). The Apprendi Court held that "'to remove from the jury the assessment of facts that increase the prescribed range of penalties..." to which a criminal defendant is exposed violates the Sixth Amendment. Id. at 490 (quoting Jones v. United States, 526 U.S. 227, 252-53 (1999)). Here the record clearly indicates that the enhancement of Petitioner's sentence arose from two prior convictions pursuant to 21 U.S.C. § 841(b)(1)(A), not from this Court's finding of additional facts. (Plea Tr. at 15-16). Thus, Petitioner's Apprendi claim is without merit.

AN APPROPRIATE ORDER SHALL FOLLOW.

Clarence C. Newcomer, S.J.

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O R D E R

AND NOW, this day of July, 2002, upon consideration of Petitioner's Motion to Vacate, Set Aside, or Correct a Sentence and the Government's Response, it is hereby ORDERED that Petitioner's motion is DENIED.

Furthermore, as Petitioner failed to make a substantial showing of a infringement of his constitutional rights, no certificate of appealability shall issue.

AND IT IS SO ORDERED.

Clarence C. Newcomer, S.J.